Supreme Court, U.S.
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No. 92-907

In the Supreme Court of the United States

OCTOBER TERM, 1992

THOMAS A. WILKINSON, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the tax lien of the United States attaches to property that is fraudulently conveyed by the taxpayer to a third party after the responsibility for taxes arose but before the notice of lien is filed.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) and the opinion of the district court (Pet. App. A20-A34) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1992. The petition for a writ of certiorari was filed on November 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the transferee of real property located at 1215 Carey Court, Charlotte, North Carolina (the Carey Court property), and is the son of Thomas A. Wilkinson, Jr., the taxpayer in this case. At the time of the transfer of the Carey Court property, various federal employment taxes for which the the taxpayer was responsible were unpaid, although the taxpayer's liability for those taxes had not then been formally assessed. When that tax liability was thereafter assessed, the United States filed notice of its lien upon "all property and rights to property" (26 U.S.C. 6321) belonging to the taxpayer.

Petitioner filed this suit to quiet title to the Carey Court property, contending that the tax lien did not attach to that property because the property did not belong to the taxpayer at the time the notice of lien was filed. The United States contended that the transfer of that property to petitioner by the taxpayer's guardian[1] was a fraudulent conveyance and that the federal tax lien therefore validly attached to the Carey Court property.

The district court agreed with the United States, finding the transfer of the Carey Court property to be void as a fraudulent conveyance (Pet. App. A4, A20-A34). The court found that the conveyance had been made for "grossly insufficient" consideration (Pet. App. A27), that insufficient property had been retained by taxpayer's guardian following the conveyance to pay taxpayer's creditors (*id.* at A33), and that the conveyance was made for the purpose of hindering taxpayer's creditors (*ibid.*). Applying the tests set forth in *Aman* v. *Walker*, 81 S.E. 162 (N.C. 1914), the court held that the conveyance was

[1] A guardian had been appointed for the taxpayer because, following an attempted suicide, he had suffered severe brain damage and had been declared legally incompetent (Pet. App. A13).

fraudulent under North Carolina law and was therefore "void" as to the United States (Pet. App. A34).[2]

2. The court of appeals affirmed (Pet. App. A1-A10). The court agreed that the transfer of the Carey Court property failed the tests set forth in *Aman* v. *Walker* and was therefore fraudulent under North Carolina law (Pet. App. A8-A9). The court further held that the United States properly could challenge the fraudulent conveyance even though the assessment, and thus the federal lien, arose after the transfer occurred (Pet. App. A10). The court also rejected petitioner's argument that a state court order approving the transfer of the Carey Court property by the taxpayer's guardian to petitioner was denied "full faith and credit" by the district court (Pet. App. A6-A7). The court of appeals held that, since the United States had not participated in the state court proceedings, the United States was not precluded from challenging the conveyance in petitioner's quiet title action (*ibid.*).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. A lien for the recovery of federal taxes arises upon the assessment of taxes. 26 U.S.C. 6322. The lien attaches to all property and rights to property belonging to the taxpayer. 26 U.S.C. 6321, 6322. Ordinarily, the tax lien does not attach to property that a taxpayer has

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[2] The district court also found that the transfer of the Carey Court property to Ermine Wilkinson made by taxpayer six days after he was found incompetent was void because of taxpayer's incompetency. Petitioner did not contest the issue in the district court, and he did not challenge the district court's finding on appeal.

validly transferred and no longer owns. When, however, the taxpayer (acting through his guardian in this case) fraudulently disposes of property before the federal tax lien attaches, the United States is entitled—under the same standards applicable to such creditors' claims under state law—to a declaration that the fraudulent conveyance is void. *United States* v. *Ressler*, 433 F. Supp. 459, 463 (S.D. Fla. 1977), aff'd, 576 F.2d 650 (5th Cir. 1978), cert. denied, 440 U.S. 929 (1979). See also *Commissioner* v. *Stern*, 357 U.S. 39 (1958). This reference to state law occurs because, while federal law governs the right of the United States to enforce its tax lien, the determination whether the taxpayer owns "property or rights to property" is a question of state law. See *Aquilino* v. *United States*, 363 U.S. 509, 512-513 (1960). Under North Carolina law, to which reference is made in this case, a conveyance is fraudulent if (i) insufficient consideration was given and the grantor did not retain property sufficient and available to pay his then existing debts, (ii) insufficient consideration was given and the grantor had the intent to hinder or defraud his creditors, or if (iii) the consideration was sufficient, but the grantor had the intent to hinder or defraud his creditors and the grantee had notice of, or participated in, this intent. *Aman* v. *Walker*, 81 S.E. at 164.

The courts below correctly concluded that the conveyance of the Carey Court property to petitioner was fraudulent under the first two tests described above.[3] It was admitted at trial that taxpayer was insolvent at the time the Carey Court property was transferred to petitioner (Pet. App. A23, A31). It was also undisputed, and the district court found, that the conveyance was made for "grossly inadequate" consideration (Pet. App. A31).

[3] The district court and the court of appeals did not apply the third test and we will therefore not address it.

The first of the three alternative North Carolina fraudulent conveyance standards is therefore satisfied in this case.

Moreover, taxpayer's guardian admitted that the existence of taxpayer's many creditors influenced his decision to transfer the Carey Court property to petitioner (Pet. App. A32). Because "the purpose of the conveyance of the Carey Court Property was to hinder the taxpayer's creditors" (Pet. App. A33), the second of the three alternative North Carolina fraudulent conveyance standards is therefore also satisfied.

Petitioner nonetheless claims (Pet. 13-19) that the United States' lien cannot attach to the Carey Court property because the notice of lien was filed *after* the property was transferred and thus at a time when the taxpayer no longer owned the property. The lower courts correctly held, however, that the transfer was void as a fraudulent conveyance (Pet. App. A8-A9, A33). Since the United States became a creditor of the taxpayer *before* the conveyance was made,[4] the United

[4] The unpaid employment taxes for the taxpayer's business were due in 1984, 1985 and 1986. The taxpayer's responsibility for those taxes traces to those dates. See *Kalb* v. *United States*, 505 F.2d 506, 509 (2d Cir. 1974), cert. denied, 421 U.S. 979 (1975). See also *Teel* v. *United States*, 529 F.2d 903, 906 (9th Cir. 1976); *United States* v. *Glascock*, 631 F. Supp. 383 (N.D. Ala. 1986), aff'd, 815 F.2d 716 (11th Cir. 1987) (Table); *United States* v. *Edwards*, 572 F. Supp. 1527 (D. Conn. 1983); *In re Serignese*, 214 F. Supp. 917 (D. Conn. 1963), aff'd *sub nom. Goring* v. *United States*, 330 F.2d 960 (2d Cir. 1964). The transfer of the Carey Court property did not occur until 1988 (Pet. App. A31).

Moreover, under North Carolina law, even a person who first becomes a creditor *after* a conveyance is made may challenge it as fraudulent. See *Clement* v. *Cozart*, 17 S.E. 486, 489 (N.C. 1893); Comment, *The Law of Fraudulent Conveyances in North Carolina: An Analysis and Comparison with the Uniform Fraudulent Conveyances Act*, 50 N.C.L. Rev. 873, 887-888 (1972).

States may (like any other creditor) challenge the transfer as fraudulent under North Carolina law. Pet. App. A10. See *Everett* v. *Carolina Mortgage Co.*, 1 S.E.2d 109 (N.C. 1939).

Petitioner further errs in contending (Pet. 24-26) that the taxpayer's guardian did not act with fraudulent intent. It is true that the district court stated that it did "not mean to imply in any way that the Guardian acted with any intent to defraud" (Pet. App. A33). It also found, however, that "[t]he purpose of the conveyance of the Carey Court Property was to hinder the taxpayer's creditors, including the United States" (*ibid.*). Under North Carolina law, a conveyance is fraudulent if the transferor acted with an intent to hinder or delay creditors *or* an intent to defraud creditors. *Nytco Leasing, Inc.* v. *Southeastern Motels, Inc.*, 252 S.E.2d 826, 833 (N.C. Ct. App. 1979). As the courts below concluded, because the taxpayer's guardian admitted that he sought to keep the Carey Court property out of the hands of taxpayer's creditors, he had the intent necessary for the conveyance to be fraudulent under North Carolina law (Pet. App. A8-A9, A33). In any event, this fact-bound application of state-law principles presents no issue warranting further review.

2. Petitioner argues (Pet. 20-23) that the state court order approving the transfer of the taxpayer's property by his guardian must be accorded full faith and credit by the district court. But the United States was not a party to that guardianship proceeding and is not bound by it. See *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970); see also *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979). Moreover, the state court did not consider whether the transfer of the property to petitioner was a fraud on the taxpayer's creditors, for that issue was not raised or considered at that time. The state court proceeding merely considered whether the transfer

proposed by the guardian was "fair and just" to the taxpayer and was in his best interest (Pet. App. A7). The court of appeals therefore correctly held (*ibid.*) that the United States was free to challenge the conveyance as fraudulent in this quiet title action.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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